IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.V.K.BALI
&
THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

WEDNESDAY, THE 4TH JANUARY 2007 / 14TH POUSHA, 1928

WA.No. 2144 of 2006(E)
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[AGAINST THE JUDGMENT IN W.P.C. NO. 29864/2006]

APPELLANT: PETITIONER
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AL MARWA TRADERS, REPRESENTED BY
ITS PROPRIETOR, A.A.MOHAMMED SHERIEFF,
S/O. A.M.AVARU, 7/48A, KUMARANELLUR P.O.,
THRISSUR, KERALA.

BY ADV. SRI.P.RADHAKRISHNAN (1)

RESPONDENTS: RESPONDENTS
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1. ASSISTANT COMMISSIONER OF IMPORTS,
CUSTOMS HOUSE, COCHIN.

2. UNION OF INDIA,
SECRETARY MINISTRY OF FINANCE.

3. DIRECTOR,
CENTRAL FOOD LABORATORY, CFTRI, MYSORE.

BY ADV. SRI.JOHN VARGHESE, ASSISTANT SG

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD
ON 19/12/2006, A/W. W.A.NO. 2144/2007, THE COURT ON 04/01/2007
DELIVERED THE FOLLOWING:

V.K. Bali, C.J. & S. Siri Jagan, J.

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W.A. Nos. 2144 & 2179 of 2006

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Dated this, the 4th January, 2007.

J U D G M E N T

Siri Jagan, J.

We are disposing of these two writ appeals by a common judgment since facts in the same are identical and common issues arise for consideration.

2. Appellants in these two writ appeals are importers of ungarbled betel nuts. They are aggrieved by the action of the customs authorities in detaining consignments of betel nuts imported by them for the purpose of manufacturing Supari. According to them, the betel nuts they have imported are ungarbled betel nuts which are freely importable under the Exim Policy, subject to clearance under the provisions of the Plant, Fruits and Seeds (Regulation of Import into India) Order 1989 and the Plant Quarantine (Regulation of Import into India) Order, 2003, issued under the provisions of the Destructive Insects and Pests Act, 1914. They are now aggrieved by the action of the customs authorities in subjecting samples of the ungarbled betel nuts imported by them to tests under the Prevention of Food Adulteration Act, 1954 (for short 'the Act') as per the specifications prescribed in Item A 28.04 of Appendix B containing definitions and standards of quality prescribed under Rule 5 of the Prevention of Food Adulteration Rules, 1955. According to them, ungarbled betel nuts imported by them being a primary food, would not come within the meaning assigned to dry fruits and nuts under Item A 28.04 for which alone standards have been prescribed under the said Act and therefore such goods cannot be subjected to tests for such standards. They would submit that if ungarbled betel nuts are subjected to tests for the standards prescribed under Item A 28.04, nobody can import ungarbled betel nuts into India, since, practically,

the ungarbled betel nuts would not satisfy the standards prescribed under Item A 28.04. They would further submit that formerly ungarbled betel nuts imported were not subjected to tests for such standards, and only because of Ext. P1 communication whereby the Director General of Health Services is stated to have opined that Supari (betel nut split or whole) is an item of food in view of the decision of Supreme Court Pyarali K. Tejani v. Mahadeo Ramachandra Dange and others, [1974 (1) SCC 167], to which the provision of the Act and the provision relating to clearance of food items would be applicable while allowing clearance of the same from customs locations, that the customs authorities are now insisting on conformity to such standards. Since the betel nuts imported by the appellants are being subjected to the tests for the standards prescribed as per Item A 28.04 mentioned above, they have filed writ petitions from which these writ appeals arise challenging the said notification. However, the learned Single Judge relegated them to the adjudicating authority under the Customs Act without going into the merits of their contentions. The appellants are challenging the said judgment in these writ appeals.

3. The contention of the appellants is that since ungarbled betel nuts being a primary food, the customs authorities cannot take samples of the same as an item of food for analysis in view of the proviso to sub-section (2) of Section 10 of the Act. They would further submit that since betel nuts are put to rigorous tests under the Plant, Fruits and Seeds (Regulation of Import into India) Order 1989 and the Plant Quarantine (Regulation of Import into India) Order, 2003, there cannot be any chance of the betel nuts imported by the appellants being sub standard food articles and therefore once it is held that the

specifications under Clause A 28.04 is not applicable to the betel nuts imported, no other tests or analysis is necessary for clearance of the betel nuts imported by them. It is their contention that no standards are prescribed for ungarbled betel nuts under the Act and therefore the same cannot be subjected to tests for any of the standards prescribed under Appendix B to the Act.

4. In the counter affidavit filed on behalf of the respondents, the respondents would submit that the Supreme Court in the decision in Pyarali K. Tejani's case (supra) has categorically held that betel nut is a 'food' coming within the definition of “foods” in the Act and by Annexure A1, the Ministry of Finance has specifically directed as follows:

> “All the consignments of edible/food products imported through Ports, Airports, ICDS, CFSs, and Land Customs Station shall be referred to PHOs for testing and clearance shall be allowed only after receipt of the test report. Pending receipt of test report, such consignments may be allowed to be stored in warehouses under Section 49 of the Customs Act, 1962. If the product fails the test, the Customs authorities will ensure that the goods re re-exported out of the country by following the usual adjudication procedure or destroyed as required under the relevant rules.”

According to them, the respondents have only complied with the said directions which are perfectly in accordance with the provisions of the Prevention of Food Adulteration Act and Rules, in view of the Supreme Court decision declaring betel nut as an item of food.

5. We have considered the rival contentions in detail.

6. Although the learned Single Judge has not decided the writ petitions on merit and only relegated the appellants to the adjudication proceedings under the Customs Act, we are inclined to go into the merits of the case since what has been posed before us is a

question of law and admittedly betel nuts are susceptible to speedy decay and may not survive the time taken for such adjudication proceedings. Before we go into the contentions of the parties, it would be advantageous to extract the relevant provisions applicable to the subject. The term 'food' is defined in sub-section (v) of Section 2 of the Act. It is not necessary to discuss applicability of that definition now to betel nut because the Supreme Court has declared that Supari (betel nut split or whole) is a food item in the abovesaid decision. The customs authorities get the power to subject food items imported into India to tests for standards prescribed under the Act by virtue of Section 6 of the Act, which reads thus:

> "**6. Application of law relating to sea customs and powers of customs officers**
>
> (1) The law for the time being in force relating to sea customs and to goods, the import of which is prohibited by section 18 of the Sea Customs Act, 1878 (8 of 1978), shall, subject to the provisions of section 16 of this Act, apply in respect of articles of food, the import of which is prohibited under section 5 of this Act, and officers of customs and officers empowered under that Act to perform the duties imposed thereby on a Commissioner of Customs and other officers of customs shall have the same powers in respect of such articles of food as they have for the time being in respect of such goods as aforesaid.
>
> (2) Without prejudice to the provisions of sub-section (1), the Commissioner of Customs, or any officer of the Government authorised by the Central Government in this behalf, may detain any imported package which he suspects to contain any article of food the import of which is prohibited under section 5 of this Act and shall forthwith report such detention to the Director of the Central Food Laboratory and, if required by him, forward the package or send samples of any suspected article of food found therein to the said laboratory."

7. Under Section 5, import of certain articles of food are prohibited. Section 5 reads as follows:

"5. Prohibition of import of certain articles of food.

No person shall import into India--

(i) any adulterated food;

(ii) any misbranded food;

(iii) any article of food for the import of which a licence is prescribed, except in accordance with the conditions of the licence; and

(iv) any article of food in contravention of any other provision of this act or of any rule made thereunder."

8. The word 'adulterated' is defined in sub-section (ia) of Section 2 of the Act as follows:

"2. Definitions.

.. .. ..

(ia) "adulterated" -- an article of food shall be deemed to be adulterated --

(a) if the article sold by a vendor is not of the nature, substance or quality demanded by the purchaser and is to his prejudice, or is not of the nature, substance or quality which it purports or is represented to be;

(b) if the article contains any other substance which affects, or if the article is so processed as to affect, injuriously the nature, substance or quality thereof;
(c) if any inferior or cheaper substance has been substituted wholly or in part for the article so as to affect injuriously the nature, substance or quality thereof;

(d) if any constituent of the article has been wholly or in part abstracted so as to affect injuriously the nature, substance or quality thereof;

(e) if the article has been prepared, packed or kept under insanitary conditions whereby it has become contaminated or injurious to health;

(f) if the article consists wholly or in part of any filthy, putrid, rotten, decomposed or diseased animal or vegetable substance or is insect-infested or is otherwise unfit for human

consumption;

(g) if the article is obtained from a diseased animal;

(h) if the article contains any poisonous or other ingredient in which renders it injurious to health;

(i) if the container of the article is composed, whether wholly or in part, of any poisonous or deleterious substance which renders its contents injurious to health;

(j) if any colouring matter other than that prescribed in respect thereof is present in the article, or if the amounts of the prescribed colouring matter which is present in the article are not within the prescribed limits of variability;

(k) if the article contains any prohibited preservative or permitted preservative in excess of the prescribed limits;

(l) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability, which renders it injurious to health;

(m) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injurious to health:

PROVIDED that, where the quality or purity of the article, being primary food, has fallen below the prescribed standards or its constituents are present in quantities not within the prescribed limits of variability, in either case, solely due to natural causes and beyond the control of human agency, then, such article shall not be deemed to be adulterated within the meaning of this sub-clause.

Explanation: Where two or more articles of primary food are mixed together and the resultant article of food--

(a) is stored, sold or distributed under a name which denotes the ingredients thereof; and

(b) is not injurious to health,

then, such resultant article shall not be deemed to be adulterated within the meaning of this clause."

9. Powers of Food Inspectors which are applicable to officers of customs by virtue of Section 6 of the Act are prescribed in Section 10 of the Act, sub-sections (1) and (2) of which are relevant for our purposes, which read thus:

> "**10. Powers of Food Inspectors:-** (1) A Food Inspector shall have power--
>
> (a) to take samples of any article of food from--
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> (i) any person selling such article;
>
> (ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee;
>
> (iii) a consignee after delivery of any such article to him; and
>
> (b) to send such samples for analysis to the public analyst for the local area within which such sample has been taken;
>
> (c) with the previous approval of the Local (Health) Authority having jurisdiction in the local area concerned, or with the previous approval of the food (Health) Authority, to prohibit the sale of any article of food in the interest of public health.
>
> Explanation:- for the purposes of sub-clause (iii) of clause (a), "consignee" does not include a person who purchases or receives any article of food for his own consumption.
>
> (2) Any Food Inspector may enter and inspect any place where any article of food is manufactured, or stored for sale, or stored for the manufacture of any other article of food for sale, or exposed or exhibited for sale or where any adulterant is manufactured or kept, and take samples of such article of food or adulterant for analysis:
>
> Provided that no sample of any article of food, being primary food, shall be taken under this sub-section if it is not intended for sale as such food.
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> xx xx xx

10. Under Rule 5 of the Food Adulteration Rules, 1955, standards of quality of the various articles of food items specified in Appendix B to the Rules are as defined in that Appendix. Appendix B

contains the definitions and standards of quality which are prescribed under Rule 5.

11. Item No. A 28.04 of Appendix **B** which is the one relied on by the respondents reads as follows:

> "A.28.04 Dry Fruits and Nuts means the products obtained by drying sound, clean fruits and nuts of proper maturity. The product may be with or without stalks, shelled or unshelled, pitted or unpitted or pressed into blocks. The product shall be free from mould, living/dead insects, insect fragments and rodent contamination. The product shall be uniform in colour with a pleasant taste and flavour characteristic of the fruit/nut free from off flavour, mustiness, rancidity and evidence of fermentation. The product shall be free from added colouring. The product shall conform to the following requirements:-
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> | | |
> |---|---|
> | (i) Extraneous Vegetables matter (m/m) | Not more than 1.0 percent |
> | (ii) Damaged/Discoloured Units (m/m) | Not more than 2.0 percent |
> | (iii) Acidity of extracted fat expressed as Oleic Acid | Not more than 1.25 percent |
>
> Explanation: For the purpose of this paragraph--
> (i) 'Extraneous vegetable matter' means stalks, pieces of shells, pits, fibre, peel.
>
> (ii) 'Damaged or Discoloured' means units affected by sunburn, scars, mechanical injury, discolouration and insects."

12. In the light of the above provisions, let us examine whether ungarbled betel nuts would come within the above said provisions so as to become liable for being subjected to tests for the standards prescribed under Item A 28.04 of Appendix B to the Rules as claimed by the respondents, which is disputed by the appellants.

13. In the counter affidavit, the respondents have specifically admitted that what the appellants had imported is <u>betel nuts in ungarbled form</u>. The ordinary meaning of 'garble' is 'to clean, sift, to select what may serve on sole purpose from etc.,". The question as to

whether betel nut is a fruit product was the subject matter of decision of the Supreme Court in Dineshchandra Jamnadas Gandhi v. State of Gujarat and another, reported in (1989) 1 SCC 420. In that decision, the Supreme Court had occasion to consider the nature of the agricultural product named "betel nuts". There, the Supreme Court had noted that in Encyclopedia Britanicana (Vol. 3, p. 551) with reference to "betel nut", it is mentioned as follows:

> "The name betel is applied to two different plants which in the east are very closely associated in the purposes to which they are applied. The betel nut is the fruit of the areca or betel palm (areca catechu) . . . . .
>
> For chewing, the fruits are annually gathered between the months of August and November, before they are quite ripe, and deprived of their husks. They are prepared by boiling in water, cutting up into slices and drying in the sub, by which treatment the slices assume a dark brown or black colour . . . . .
>
> . . . . . Betel nuts are used as a source of inferior catechu (g.v.); its chief alkaloid is arecoline, to which anthelmintic properties are attributed. The drug finds some use in veterinary medicine as an anthelmintic."

In that decision, the Supreme Court has held that betel nut is not a fruit product. Therefore, betel nut cannot be a dry fruit coming within the standards prescribed under A 28.04. Then the next question would be whether it is a dry nut. For attracting standards under A 28.04, the imported article must be products obtained by drying sound, clean fruits and nuts of proper maturity. It is not disputed before us that the betel nuts imported by the appellants are in the de-husked form but containing an outer layer, which has to be scraped and removed and dried for the purpose of making it fit for making Supari as is usually known to the market. In the context of the Prevention of Food Adulteration Act, when an agricultural product would be a primary food in the natural form was the subject

matter of decision by a learned Single Judge of this Court in State of Kerala v. Thankappan, 1982 KLT 343. Paragraphs 3 and 4 of the said decision reads thus:

> "3. There two questions arise in both the cases for consideration. The learned Public Prosecutor,Mr. Bhaskaran contended that the court below had taken a wrong view in coming to the conclusion that 'Vadapparippu' and 'Thuvarapparippu' are primary foods. According to him, if once there is a dehusking of pluses or of cereals, they will cease to be primary food. The court below had said on the basis of the proviso to S. 2 (ia) of the Act which states that an article of food shall be deemed to be not adulterated, where the quality of purity of the article, being primary food, has fallen below the prescribed standards or its constituents are present in quantities not within the prescribed limits of variability, in either case, solely due to natural causes and beyond the control of human agency that Vadapparippu and Thuvarapparikppu being primary food the accused can take advantage of this provision. Even if the covering of the seed have been removed, or the seed even splitted up, the pulses will not lose their character of primary food in its natural form. There has been no mechanical process involved in processing them. They continue to be in their natural form. The only thing is that the covering had been removed. The shape and arrangement as it existed within the outer covering are still retained. Now in both cases it is admitted that the materials had been properly kept clean and safe. If there were insects that would be only because of natural cause and beyond the control of human agency.
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> 4. In considering this question one may take note of the definition of the word 'food'. Food as defined in the Act means any article used as food or drink for human consumption other than drugs and water and includes - (a) any article which ordinarily enters into, or is used in the composition or preparation of, human food, (b) any flavouring matter or condiments, and (c) any other article which the Central Government may having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes of the Act. 'Primary food' is defined in S. 2 (xii-a) to mean any article of food, being a produce of agriculture or horticulture in its natural form. As Mr. N. Mohandas, learned counsel for the respondents contends if the seed without its outer cover is food as defined and if it is a product of agriculture and if it still retains its natural form which it had within the covering, which had been removed, it is primary food. For example, paddy as such will not be food as defined in the Act. But after dehusking the rice that obtained can certainly be considered to be primary food, because it retains its natural form, though the outer covering has been removed by

dehusking and it is an article of food and a produce of agriculture. For the same reason Vadaparippu and Thuvaraparippu can be considered to be primary food. These pulses when its outer cover is removed will be articles of food as well as products of agriculture. There cannot be any dispute with regard to that. The only question that will arise is, it is in its natural form. According to Webster's New Collegiate Dictionary natural means, being in accordance with or determined by nature--having or constituting a classification based on features existing in nature. Conscise Oxford Dictionary gives the meaning of 'natural' as normal, comfortable to the ordinary course of nature existing in or by nature, not artificial. A new English Dictionary on Historical Principles edited by Sir James A.H. Murray gives the meaning of the word 'natural' as follows:

> "Natural--(of substances or articles) not made,manufactured or obtained by artificial processes. Also sometimes applied to products in contrast to these requiring more elaborate preparation. Having the normal form, not disfigured or disguised in any way."

'Form' has as per the said Dictionary the meaning--relevant in the present context alone is quoted--"shape, arrangement of parts, visible aspects (esp. apart from colour) shape, of body - mode in which a thing exists or manifests itself." Therefore, removal of the cover cannot be said to make a different shaping or different arrangement of the parts making it different from its natural form. The natural form is still retained. In this view, I agree with Mr Mohandas in his contention that the lower court was correct in coming to the conclusion that the materials are primary food."

(Emphasis supplied)

14. We are in respectful agreement with the said finding in that decision which holds that the removal of the cover cannot be said to make a different shaping or different arrangement of the parts making it different from its natural form and that the natural form is still retained meaning thereby that such article would still continue to be primary food. Tested in the light of that decision, we are of opinion that despite the de-husking areacanut, the article now under reference would still be a primary food since it contains an outer layer which has to be scraped and removed for making betel nut edible as a food item. Going by the description of betel nut in the Encyclopedia

Britanicana as noted by the Supreme Court, betel nuts after being deprived of their husks have to be prepared by boiling in water, cutting up into slices and drying it in the sun for making it fit for market or for consumption. According to the appellants, the imported betel nuts in the primary form have to be at a minimum, scraped to remove the outer layer and then dried so as to attract the definition and standards prescribed under clause A 28.04 as a dry nut. The respondents could not with any material in support could contradict this definite case of the appellants. On the other hand, they categorically admit that it is in the ungarbled form. Further Item A 28.04, speaks of products obtained by drying sound clean fruits and nuts of proper maturity. The respondents have no case that betel nuts imported by the appellants are products so obtained. That being so, the customs officers, by virtue of powers under Section 10 read with Section 6 cannot take samples of the betel nuts imported by the appellants as articles of food or adulterant for analysis, since, going by the proviso to Section 10(2) of the Act, no sample of any article of food, being primary food, shall be taken under the sub-section, if it is not intended for sale as such food. The respondents in their counter affidavit could not bring out either that the betel nut is not a primary food or that it is intended for sale as such food. On the other hand, the appellants have, with sufficient material on record, succeeded in proving that the betel nut imported by them is a primary food and that the same is not intended for sale as such food since for consumption, the same has to undergo a further process of scraping the outer layer and drying the same before making it into Supari as known to the market or at least to make it edible even as it is.

15. Therefore, we are satisfied that samples of the betel nut

imported by the appellants cannot be taken for analysis under Section 10(2) and subjected to the tests for the standards prescribed under Item A 28.04 of Appendix B to the Act as a dry nut.

16. Apart from the legal aspects as elucidated above, there is a practical aspect of the same also in the commercial sense. It is not denied that the appellants themselves have been importing betel nuts in the present form for quite some time without having to undergone the present test prescribed for dry fruits and nuts. It is also abundantly clear that the betel nut in the form in which the appellants imported the same would not satisfy the standards prescribed in Item A 28.04. Therefore, the compulsory subjecting of such betel nuts to the test for the standards prescribed in item A 28.04 would have the practical effect of prohibiting the import of betel nut altogether.

17. However, in public interest, we make it clear that although betel nuts imported by the appellants cannot be subjected to test for the standards prescribed under Item A 29.04, certainly, the respondents can ensure that the same is not adultered in the sense mentioned in Section 2 (b), (e) and (f) so as to see that the appellants are not importing betel nuts which are not injurious to the health of the ultimate consumer, who may consume the product made of betel nuts imported by the appellants. We are told by the counsel for the appellants that the inspection under the provisions of the Plant, Fruits and Seeds (Regulation of Import into India) Order 1989 and the Plant Quarantine (Regulation of Import into India) Order, 2003, would ensure the same. However, we leave it to the Customs Authorities to ensure, but without causing any delay in clearance of the goods on account of that, taking into account the perishable nature of the goods.

In the result, we allow the writ appeals and set aside the judgment of the learned Single Judge and declare that the betel nuts imported by the appellants are not liable to be tested for the standards prescribed under item A 28.04 of Appendix B to the Food Adulteration Rules, 1955. However, for this purpose, we do not think it necessary to quash Ext. P1 except to clarify that Ext. P1 does not specifically require testing for standards prescribed under item A 28.04 as above at least for betel nuts. The respondents are directed to allow the appellants to clear the betel nuts imported by the appellants, provided they satisfy other conditions for such import without any further delay. We also clarify that since consignment has been detained by the customs authorities for a purpose not authorised by law, the appellants would not be liable to pay demurrages, if any, claimed by the authorities concerned.

V.K. Bali, Chief Justice.

S. Siri Jagan, Judge.

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